IN THE

Supreme Court of the United States

October Term, 1958.

No. 313

CARL REISTLINE,

Petitioner,

vs.

CITY OF SAN DIEGO and GENERAL DYNAMICS CORPORATION,

Respondents.

Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to review the opinion and decision of the United States Court of Appeals for the Ninth Circuit in the case entitled; Carl Beistline, Appellant *vs.* City of San Diego and General Dynamics Corporation, Appellees.

Opinions of Court Below.

The opinion of the District Court of the United States, Southern District of California, Southern Division (Ap. p. 1) has not been reported; and the opinion of the Court of Appeals (Ap. p. 3) had not reported at the time this petition went to press.

Jurisdiction.

The judgment of the Court of Appeals is dated June 3, 1958, was entered on that date (Ap. p. 3). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Sec. 1254 (1) which provides for review by this Court "By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

Questions Presented.

1. Whether a complaint which alleges that a defendant Municipal Corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under the false and fraudulent representation that such real property was to be used by the Municipal Corporation for a public purpose, states a cause of action of which the District Court of the United States has jurisdiction.

2. Whether a complaint which alleges that a defendant Municipal corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under its representation that such real property was to be used by the Municipal corporation for a public purpose, and has not used such real property for a public purpose, but conveyed it to a defendant corporation for industrial uses, states a cause of action of which the District Court of the United States has jurisdiction.

Constitutional Provisions.

The provisions of the Constitution of the United States of America which are involved in this case are found in Amendment V, which provides: "* * * nor shall private property be taken for public use without just compensation," and in Amendment XIV, which provides: "* * * nor shall any State deprive any person of life, liberty, or property without due process of law."

Statement of Case.

The basis for invoking the jurisdiction of the Court in the first instance is found in 28 U. S. C. Sec. 1331, which provides: "The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Petitioner filed his complaint on May 29, 1957 in two counts against Respondents City of San Diego and General Dynamics Corporation [R. 1]. The first count alleges that plaintiff sold eighty-two acres of land to the defendant City of San Diego as a result of fraudulent representations of the City that it intended to use the lands for a public purpose, namely for the use of a Municipal airport, and as a result of a condemnation suit brought against the plaintiff and others to condemn his and others' land; that the price for said land paid to plaintiff was $62.00 an acre, or a total of $5,184.00; that on the 20th day of July, 1957 the defendant City of San Diego sold substantially all of the real property to the defendant General Dynamics Corporation for the purpose of industrial use at a price of $3100.00 an acre, or a total consideration of approximately $245,000.00, and that plaintiff would not have sold said property to the de-

fendant City had it not been for the said fraudulent representations; and that the defendant General Dynamics Corporation had knowledge of the fraudulent representations.

The second count incorporates substantially all of the foregoing and in addition alleges that the said real property has never been put to a public use. The conveyance was made upon condition that the City of San Diego was to use said property for a public purpose; that the plaintiff has been deprived of his property without due process of law, and that the defendant General Dynamics Corporation had knowledge of the manner and means by which the City has acquired the said property.

The respondent City of San Diego filed its motion to dismiss the complaint upon the grounds that no relief could be granted thereon, and that the jurisdiction of the Court was invoked solely on the grounds that the action arose under the Constitution and laws of the United States, and that it is an inhabitant of the State of California [R. 10]. The respondent General Dynamics Corporation filed its motion to dismiss the complaint upon the ground that it failed to state a claim against the defendant upon which relief could be granted, and on the ground that the Court lacked jurisdiction because the complaint failed to state facts constituting diversity of citizenship or constituting an action arising out of the Constitution or laws of the United States and that jurisdiction of the Court was invoked solely on the ground that the action arises under the Constitution and laws of the United States [R. 11].

On August 14, 1957 the Court granted both motions to dismiss with leave to file an amended complaint within twenty days (Ap. p. 2).

Petitioner filed his notice of appeal with the United States Court of Appeals for the Ninth Circuit [R. 15].

On June 3, 1958 the United States Court of Appeals for the Ninth Circuit affirmed the judgment for lack of jurisdiction (Ap. p. 3).

Reasons for Writ of Certiorari.

There is no enabling statute in California authorizing an action against a Municipal corporation for the fraud of its officers (35 Cal. Jur. 2d 294). In an article in 7 So. Cal. L. Rev. 295, 308 it is stated "in the absence of statute it is safe to state that no tort liability attaches to the municipality for the false representations of its officers * * *." Accordingly, no cause of action may arise for such fraud of one of the United States unless the Constitution of the United States seeks to prevent the taking of private property by a state agency for private use, even if such taking is accomplished by fraud.

That the Constitution of the United States of America does prevent a state from taking a person's property for purposes of speculation is the gist of petitioner's contention. The count containing fraud merely states a clearer case of an unconstitutional act. The constitutional question is not a mere incident to his claim as in *Gully v. First National Bank in Meridian*, 295 U. S. 107, 57 S. Ct. 96, 81 L. Ed. 72.

The holding of the Court is in conflict with *Portland Ry. Light and Power v. City of Portland*, 181 Fed. 632 (D. Ore. Cir.), the Court there saying, page 633, "if the order of the common counsel under its authority to open the streets has deprived or is about to deprive the complainant of its property without due process of law, it is entitled to remedy in this Court * * *," and in

conflict with *Weaver v. Pennsylvania Ohio Power and Light Company*, 10 F. 2d 759, 760 (6th Cir.), the Court saying, page 760, "as the bill charges collusion between the Highway authorities and private interests to use the power of eminent domain in taking plaintiff's land for private purposes without public necessity therefor, the District Court had jurisdiction on elementary principles to entertain a bill for injunction."

The decisions of the Courts below are in conflict with applicable decisions of this Court.

In *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 17 S. Ct. 130, 41 L. Ed. 489 the State of Nebraska through its Board of Transportation had ordered the plaintiff in error to surrender part of its property to private persons for the purpose of building thereon an elevator. The Supreme Court through Mr. Justice Gray held: "the taking by a State of the private property of one person or corporation for the private use of another is not due process of law and is a violation of the Fourteenth Amendment of the Constitution of the United States."

This case has been consistently followed by the Supreme Court of the United States, the latest reported case being *Thompson v. Consolidated Gas Company*, 300 U. S. 55, 57 S. Ct. 364, 81 L. Ed. 510, the Supreme Court by Mr. Justice Brandeis saying (300 U. S. 55, 80), "and this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." In *O'Neill v. Leamer*, 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249, plaintiffs in error filed an action to enjoin defendants in error, a public corporation, from constructing a ditch, alleging that the enterprise was "wholly private." The defendants in error

moved to dismiss upon the ground that no federal question was presented in the record. The Court said, by Mr. Justice Hughes, page 249, "but we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose and hence contrary to the Fourteenth Amendment as amounting to a deprivation of private property without due process of law."

Petitioner submits that where the taking has been accomplished under the fraudulent representation that the use is to be public, but is in fact private, the same federal question is presented. In the one case the wrong is yet to be accomplished. In the other the wrong has been accomplished.

Conclusion.

The ruling of the Court below makes it possible for a State Agency to take the property of a person for speculation, and even when such taking is accomplished by the fraudulent representation that the property is to be put to a public use.

Petitioner urges that such holding puts in jeapordy the right to the enjoyment of property guaranteed by the Constitution of the United States of America.

Respectfully submitted,

ELI H. LEVENSON,
Attorney for Petitioner.

McNULTY & SOUTER, and
LEVENSON, LEVENSON & BLOCK,
Of Counsel.

APPENDIX.

Memorandum of Decision.

In the United States District Court, Southern District of California, Southern Division.

Carl Beistline, Plaintiff, v. City of San Diego, and General Dynamics Corporation, Defendants. No. 2038-SD-C.

Filed Aug. 9, 1957.

In this case, the plaintiff has attempted to base jurisdiction on the ground of a federal question under 28 U.S.C.A. Sec. 1331.

The motion of General Dynamics Corporation to dismiss on the ground of lack of jurisdiction because of the absence of a federal question, is granted. Gully v. First National Bank, 299 U. S. 109.

The motion to dismiss of the City of San Diego, although not artfully drawn, (see Sequoia Union High School v. United States [9 Cir. 6/5/57, slip opinion] raises the issue of lack of jurisdiction because of the absence of a federal question. The motion is granted. Gully case, *supra*.

Counsel for General Dynamics to prepare a written order of dismissal pursuant to the rules of this court.

Order of Dismissal.

In the United States District Court, Southern District of California, Southern Division.

Carl Beistline, Plaintiff, vs. City of San Diego, and General Dynamics Corporation, Defendants. File No. 2038-SD-C.

This cause came on to be heard on the motion of the defendant, General Dynamics Corporation, and defendant, City of San Diego, to dismiss the above-entitled action because of one of jurisdiction over the subject matter, and it appearing to the court that plaintiff's Complaint fails to state facts a) constituting diversity of citizenship, b) constituting an action arising out of the Constitution or laws of the United States of America, or c) constituting any other grounds sufficient to give this court jurisdiction, it is

ORDERED that the motion to dismiss is hereby granted as to both of the above-named defendants and this action is dismissed without prejudice with leave to plaintiff to file an amended Complaint herein within 20 days from the date of this Order, and that defendants, and each of them, recover their costs.

Dated Aug. 14, 1957.

/s/ JAMES M. CARTER
U. S. District Judge

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Carl Beistline, Appellant, vs. City of San Diego and General Dynamics Corporation, Appellees. No. 15-771.

Jun. 3, 1958.

Appeal from the United States District Court for the Southern District of California, Southern Division.

Before: FEE and BARNES, Circuit Judges

BARNES, Circuit Judge:

Plaintiff-appellant sued in 1957 to rescind the sale made by him to the City of San Diego in 1947 of eigthy-two acres of land located on Kearney Mesa in the said City of San Diego, California, or, in the alternative, for an accounting of profits. Plaintiff voluntarily sold the property, but only after the City of San Diego had filed a suit to condemn the property for use as a municipal airport. Nine years later, in 1956, the City of San Diego is alleged to have sold the same land to defendant General Dynamics Corporation at a considerable profit. Plaintiff charges in his first cause of action that the representations made to him by the City of San Diego concerning the intended use of the property "were entirely false and untrue," and that the corporate defendant knew they were untrue; in his second cause of action that the condemnation suit constituted compulsion and duress. Plaintiff sought to base jurisdiction in the United States courts on the presence of a substantial federal question. (28 U.S.C. §1331.)

Each defendant moved to dismiss upon the ground of lack of jurisdiction, *i.e.*, that no substantial federal ques-

tion was involved. Each such motion was granted. Plaintiff was granted leave to amend, but preferred to stand on his complaint, and here presents a timely appeal.

The essence of plaintiff's theory is that a constitutional question exists as to whether a state can deprive a citizen of property without due process of law in violation of section 1 of the fourteenth amendment because of the *taking* of property, *i.e.*, "forcing" the owner to transfer his property to the city, an agency of the state; that appellant acted under compulsion, fraud and duress; that "the central theme of each Count is that the property of plaintiff was *taken* not for a public use, but for a private use . . . * * * . . . that the immunity of plaintiffs property from seizure for private use is an essential element of plaintiff's cause of action."

Plaintiff's theory of recovery thus rests upon several facts assumed to be true: (a) that there was a "taking;" (b) that the transfer of the property was not voluntary; and (c) that the subsequent sale by the City of San Diego proves that the original acquisition was for private use and not for public use as an airport, and hence fraudulent. Each of such assumptions is incorrect.

A "taking" is accomplished by possession under an order for "vesting," Metropolitan Water District of S. Cal. v. Adams, 1940, 16 Cal. 2d 676, 107 P. 2d 618, or by payment of a final judgment in condemnation. "The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property." 23 Tracts of Land v. United States, 6 Cir., 1949, 177 F. 2d 967, 969-70. Appellant chose, by settlement, to avoid and not to force or endure any "taking" of his property. None is alleged, and none could be, under the facts of this case. Thiriot v.

Santa Clara Elementary School District, 1954, 128 Cal. App. 2d 548, 275 P. 2d 833.

The facts pleaded by appellant show the sale by him to the City of San Diego was voluntary, albeit triggered by the filing of the suit to condemn. The filing of suit to condemn is certainly a threat to do an act, but a legal threat, *i.e.*, a "threat" to exercise a sovereign power reserved by and inherent in the state in the interest of all of its people. Rose v. State, 1942, 19 Cal. 2d 713, 123 P. 2d 505. To hold that the filing of a suit to condemn is a threat constituting legal compulsion and duress would prevent and invalidate any compromise of any disputed value by any condemning authority subsequent to the filing of any suit to condemn. No such theory does or could exist in the law of condemnation, especially when it is recognized that a condemnation proceeding is by its very nature a forced or compulsory sale. Hawaiian Gas Products v. C.I.R., 9 Cir., 1942, 126 F. 2d 4, 5, and authority cited therein.

This is not a case presenting the problem raised where land has been dedicated to a public use by conveyance subject to a condition, or impressing a trust. A breach of such a condition or trust may be restrained. Here the transfer of fee simple title was unconditional and voluntary. It was the free choice of appellant, just as is any compromise of any litigant's law suit.

Because a sovereign body plans to acquire private property for a lawful purpose (here an airport), does acquire the property with such purpose, and thereafter changes its corporate mind and uses the property for a different purpose, or even trades or sells the property to another, and at an increased price, does not thereby establish a taking for a private use, nor fraud, nor any fraudulent or

false or untrue representations. Need for taking the particular land, like the issue of compensation for the taking, is judged solely by the conditions existing at the time of the taking. Reichelderfer v. Quinn, 1932, 287 U. S. 315, 323; Spinks v. City of Los Angeles, 220 Cal. 360, 31 P. 2d 193; Arechiga v. Housing Authority of the City of Los Angeles, ... A.C.A....., decided April 24, 1958; 18 Am. Jur., Eminent Domain, §124, p. 768.[1] (*Cf.* Ritzman v. City of Los Angeles, 1940, 38 Cal. App. 2d 470, 101 P. 2d 541.)

Appellant was given the opportunity to amend his pleadings, but refused. He prefers to rely on the meager conclusions he pleads, that the purchase and subsequent sale, according to his best information and belief, constitute fraud. The only facts alleged, *i.e.*, the purchase and the subsequent sale, cannot support a charge of extrinsic fraud.

Here, the language quoted in the Thiriot case, *supra*, is directly in point because of the factual similarity in the two cases. There, the California court said the fraud alleged pertained to one of the main issues in any condemnation suit, the necessity of the taking for a use authorized by law. (Cal. Code Civ. Proc. §1241.) The court then pointed out that the fraud charged must be extrinsic or collateral fraud.[2] No suggestion of extrinsic fraud is here pleaded.

[1] In 18 Am. Jur., Eminent Domain §124, p. 768, the text reads:

"When land has been acquired for the public use in fee simple unconditional, either by the exercise of the power of eminent domain or by purchase, the former owners retain no rights in the land, and the public use may be abandoned or the land may be devoted to a different use without any impairment of the estate acquired or any reversion to the former owners."

[2] "What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the book

But were we to assume that appellant could plead or prove facts which would entitle him to try the issues of fraud and duress, he still would not be entitled to bring his action in the federal court. Every case involving fraud and duress does not involve a constitutional question of due process. A general allegation of a constitutional issue is sufficient, but the claim or fact upon which the constitutional issue is raised must be pleaded, and "well-pleaded." 2 Moore, Fed. Prac. & Proc. §8.09, p. 1630 (2d 1957). The facts here, interpreted most favorably toward appellant, show no deprivation of due process by the City of San Diego in the acquisition of the property.

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are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest.' Pico v. Cohen, 1891, 91 Cal. 129, 133-134, 25 P. 970, 971, 27 P. 537, 13 L.R.A. 336.

This principle and these rules still obtain. 'The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. * * * Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. * * * If an unsuccessful party to an action has been kept in ignorance thereof * * * or has been prevented from fully participating therein * * *, there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. * * * Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court.' Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. * * *' Westphal v. Westphal, 1942, 20 Cal. 2d 393, 397, 126 P. 2d 105, 106." Ehrlich v. Santa Clara Elementary School District, 1954, 128 Cal. App. 2d 548, 550, 275 P. 2d 833, 835.

and call for the application of the rule of Gully v. The First National Bank in Meridian, 1936, 299 U. S. 109, as applied by the court below, and as followed in Rosecrans v. William S. Lozier, Inc., 8 Cir., 1944, 142 F. 2d 118. The latter case says (p. 121), quoting in part from Gully, *supra:*

> "It is not always easy to determine when a suit may be said to arise under the Constitution or laws of the United States. Some tests, however, seem to be well recognized. To bring a case within the removal statute, *a right or immunity created by the Constitution or laws of the United States must be the essential element of plaintiff's cause of action. Gully vs. First National Bank, supra.* It is not sufficient to warrant removal that in the progress of the trial it *may* be necessary to give a construction to the Constitution or laws of the United States, but the case must substantially involve a dispute or controversy as to the effect or construction of the Constitution, laws or treaties of the United States, upon the determination of which the result depends. *The controversy must be genuine and present as distinguished from a possible or conjectural one.*" [Emphasis added.]

If the plaintiff can plead and prove a good case of fraud and duress, his remedy lies, as it does with any other litigant, in the state court.

We affirm the judgment below for lack of jurisdiction.

(Endorsed:) Opinion. Filed Jun. 3, 1958.

As amended by order
of June 16, 1958.

PAUL P. O'BRIEN, Clerk.